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No. _____

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**In The
Supreme Court of the United States
October Term, 1983**

— o —
SAMUEL P. GARRISON, etc.,
Petitioners,

vs.

GEORGE SMITH ALSTON,
Respondent.

— o —
**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

— o —
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QUESTIONS PRESENTED

1. What is the proper formulation for describing effective assistance of counsel; and under it, does missing an objection which might have won a new trial on appeal constitute ineffectiveness?
2. Has actual and substantial prejudice been shown where an incriminating piece of evidence, wrongly admitted, is fit in to the defendant's version of the facts and explained by him?

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**PETITION FOR WRIT OF CERTIORARI
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The petitioner, Samuel P. Garrison, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of *Alston v. Garrison*, 720 F.2d 812 (4th Cir. 1983) reversing *Alston v. Garrison*, No. 81-0049-HC, unpublished (EDNC, February 4, 1982).

OPINION BELOW

The opinion of the United States Court of Appeals is reported as set out above and a copy of it is attached as Appendix A to this petition (App. 1). The District Court opinion is attached as Appendix C (App. 16).

JURISDICTION

The jurisdiction of this Court is invoked under 28 USC §1254(1) within ninety days of the date of the Court of Appeals' decision: November 3, 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Assistance of Counsel Clause of the Sixth Amendment which provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."

STATEMENT OF THE CASE

George Alston was convicted at the August 15, 1977 Criminal Session for Cumberland County, Honorable D. Marsh McLelland, Judge Presiding, in case numbers 76 CRS 46757, 46758, and 46759 in which he was charged

with kidnapping, armed robbery and felonious assault, respectively, after jury trial at which he both testified and offered other evidence. He was sentenced to concurrent life sentences for kidnapping and armed robbery and a consecutive sentence of 20 years for assault. The North Carolina Supreme Court affirmed his conviction on 17 April 1978, *State v. Alston*, 294 NC 577. At trial and on appeal, petitioner was represented by court-appointed counsel, James M. Cooper, Esquire, from the Cumberland County Bar. He exhausted his state remedies on the issues now before this Court by an application for post-conviction relief filed on his behalf by the staff of the University of North Carolina Law School on 12 March 1979 which was denied on 16 March 1979 by Judge McLelland without a hearing with the North Carolina Supreme Court denying certiorari on 18 July 1979. His lawyers then applied for relief from the United States District Court for the Eastern District of North Carolina but were denied same without a hearing by order of Honorable John D. Larkins, as previously reported in the opening paragraph to this petition. The United States Court of Appeals for the Fourth Circuit reversed Judge Larkins on November 3, 1983, directing that the writ issue on Mr. Alston's behalf.

STATEMENT OF FACTS

George Alston was convicted at a trial in which the state elicited a response from an investigating officer that after the officer had advised Alston of his constitutional rights, the latter started to converse but then

stopped and stated he wanted a lawyer. On cross-examination, the officer reiterated this on two occasions. No objection or motion to strike was made on any of these occasions. Additionally, Mr. Alston's trial lawyer had evidently stated to the officers conducting the lineup at which his client was identified that the lineup was "a mighty fine" one with this also coming out in evidence and being unobjected to. The trial lawyer also represented petitioner on appeal and did not assign these matters as error there. They were the subject of Alston's post-conviction motion in state court and habeas corpus application in federal court with the State asserting initially that its contemporaneous objection rule prevented review of these matters *per se* and that if approached from the standpoint of ineffective assistance of counsel, non-objection to two matters would not constitute ineffectiveness, at least under the circumstances of this case where the evidence against petitioner, while in conflict and not wholly one way or the other, did contain strong evidence of petitioner's guilt. The Fourth Circuit rejected this argument.

REASONS FOR GRANTING THE WRIT

I.

There is a conflict in the Circuits as to the description of effective assistance of counsel which this Honorable Court should resolve.

George Alston was convicted following two mistrials in a case where the evidence conflicted. The State's case, at least on paper, was fairly strong, but not so overwhelming that it would make any given evidentiary mat-

ter harmless error. During trial, his lawyer did not object to a reference to petitioner having stopped after being warned of his rights and went on to elicit other such references himself; and did not object to evidence that he had stated the line up in which Alston was identified was a good one. The Fourth Circuit found this to be ineffective assistance of counsel under its standard that representation must be within the range of competence expected of criminal law practitioners and that any failure to object must be the result of informed, professional deliberation rather than ignorance or mistake. *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977). No evidentiary hearing had ever been held on this matter and the Fourth Circuit inferred that the non-objections were due to ignorance, although it is possible to infer that counsel felt the first of these unimportant since he evidently intended to have his client explain his arrest, including his assertion of silence, his evidence in this regard generally being that he was roughed up, but never asked to make a statement. The second was apparently admissible evidence, being an admission by an agent.

The Fourth Circuit's formulation for effective assistance of counsel on evidentiary matters is one of several in the Circuits. Others include a lawyer reasonably likely to render and rendering reasonably effective assistance of counsel, *MacKenna v. Ellis*, 280 F.2d 529 (5th Cir. 1960); *United States v. Goodwin*, 531 F.2d 347 (6th Cir. 1976); *United States v. DeCoster*, 487 F.2d 1197 (DC Cir. 1973); *Cooper v. Fitzharris*, 551 F.2d 1162 (9th Cir. 1977); a lawyer having the customary skill and knowledge prevailing in the area, *Moore v. United States*, 432 F.2d 730 (3rd Cir. 1970); *Wallace v. Lockhart*, 701 F.2d 719 (8th Cir. 1983); a lawyer meeting minimum standards of pro-

fessional representation, *United States ex rel Williams v. Twomey*, 510 F.2d 634 (7th Cir. 1975); a lawyer whose conduct does not amount to a farce and mockery, *Rickenbacker v. Warden*, 550 F.2d 621 (2nd Cir. 1976); compare *Barnes v. Jones*, 665 F.2d 427 (2nd Cir. 1981)¹; and a lawyer providing reasonably competent assistance, *Cepulonis v. Ponte*, 699 F.2d 573 (1st Cir. 1983) (which is evidently determined by the Fourth Circuit ignorance/neglect v. informed, professional decision measurement); *Dyer v. Crisp*, 613 F.2d 275 (10th Cir. 1980) which, like *Rickenbacker*, provides a good summary of the various standards. Under at least three of them, missing objections to important matters at trial has not been held to constitute ineffectiveness, *United States v. Robinson*, 502 F.2d 894 (7th Cir. 1974); *United States v. Valenzuela*, 521 F.2d 414 (8th Cir. 1975); *McDonald v. Estelle*, 536 F.2d 667 (5th Cir. 1976), although there is a conflict between the circuits under the "customary skill" standard, see *Boyer v. Patton*, 579 F.2d 284 (3rd Cir. 1978).

The standards which permit representation to be described as effective despite the missing of an important objection are the appropriate ones and this Honorable Court should seize this opportunity to make this plain. Resolution of this matter would definitely favor the state in Mr. Alston's case because overall, he got very good representation which included the following: (i) hanging the jury twice; (ii) conducting lengthy cross-examination of the victim and the investigating officer; (iii) strongly attacking the identification of Alston and of the car he supposedly used; (iv) introducing evidence of an alibi

¹This has been changed to the First Circuit's standard by *Trapnell v. United States*, — F.2d —, 34 Cr.L. 2274 (2nd Cir. 1984).

through six witnesses; and (v) making an argument on appeal which required a 20 page opinion by the North Carolina Supreme Court to reject.

II.

The decision in *United States v. Frady*, 456 US 152 (1983) indicates that the Fourth Circuit's decision on prejudice to excuse forfeiture was wrong, in that the evidence complained of was fit into petitioner's version and explained by him.

In addition to presenting the matter of the standard of ineffectiveness for review, the context in which this arises also provides a basis for further amplification of the *United States v. Frady*, 456 US 152 (1982) standard for actual prejudice. The ineffectiveness found in this case was used as cause to excuse forfeiture under *Wainwright v. Sykes*, 433 US 72 (1977), and to do so it must be accompanied by actual and substantial prejudice. *Frady* tends to show there was none here. It held that because Frady claimed an alibi, he was not actually and substantially prejudiced by a jury instruction which eased the government's burden of proof on its theory of the case. A parallel exists here. Even if Alston's right to self-incrimination was violated by the officer's testimony of his post-arrest silence, he waived this right at trial and explained his pretrial silence in a different way, one which fit in with his version of the interrogation.

CONCLUSION

It is respectively argued that because of the above, a writ of certiorari should issue to review and reverse the decision of the Court of Appeals.¹

Submitted as the petition for writ of certiorari on behalf of Samuel P. Garrison, this 1st day of February, 1984.

Respectfully submitted,

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¹The Court should be aware in reviewing this case that the record does not contain the evidence from the two mistrials but only the trial at which Mr. Alston was finally convicted. Therefore, whether the evidence involved in the writ was used in the prior trials is not known, nor is it known whether new evidence was added at the third trial. Should the Court desire to take this case contingent on the availability of such transcripts, the undersigned will attempt to obtain them for judicial notice pursuant to FRE 201.

APPENDIX

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 82-6799

George Smith Alston,

Appellant,

v.

Samuel P. Garrison,
Rufus Edmisten, Attorney
General of N. C.,

Appellee.

Appeal from the United States District Court for the
Eastern District of North Carolina, at Raleigh. John D.
Larkins, Jr., Senior District Judge. C/A 81-0049-HC

Argued: April 13, 1983

Decided: November 3, 1983

Before MURNAGHAN, SPROUSE, and ERVIN,
Circuit Judges.

Michael T. Medford (Manning, Fulton & Skinner on brief)
for Appellant; Richard N. League, Special Deputy Attor-
ney General (Rufus L. Edmisten, Attorney General of
North Carolina on brief) for Appellee.

ERVIN, Circuit Judge:

George Smith Alston appeals from the denial of his
petition for a writ of habeas corpus under 28 U.S.C. § 2254.

He chiefly argues that his trial counsel's failure to object to prosecution evidence that he "stood on his constitutional rights" to remain silent denied him the effective assistance of counsel in violation of the sixth and fourteenth amendments, to a degree that prejudiced the outcome of his trial. We agree and reverse the judgment of the district court, directing the issuance of a writ of habeas corpus conditional on the results of a new trial.

I.

Around midday on December 30, 1976, James DeLay, who was traveling on foot in the vicinity of Spring Lake, North Carolina, accepted a ride from a stranger. This individual took DeLay to a secluded area in rural Cumberland County, held him at gun point, and ordered him to write a check for \$250.00 payable to the order of a name which the assailant supplied. The assailant then fired twice at DeLay, wounding him in the back with the second shot.

Next in this strange chain of events, the assailant ordered DeLay to get up and walk through the woods. When they stopped to rest, DeLay suggested that a check made out to "cash", rather than a person's name, would be processed more quickly at the bank. The assailant agreed, and DeLay wrote out a check for \$265.00 payable to cash. The first check was destroyed.

The assailant and DeLay then drove to a branch of the Cape Fear Bank in Fayetteville, and DeLay's check was cashed at a drive-in window. Afterwards the assailant drove DeLay back to Spring Lake and released him.

Later that evening, George Alston was arrested and charged with armed robbery, kidnapping, and assault with intent to kill inflicting serious injury.

II.

Alston was tried three times, with the first two trials ending in hung juries. At each trial, the State introduced the following evidence tending to show that Alston was DeLay's assailant:

1. Alston was arrested in a car similar to that described by DeLay as the vehicle of his assailant. Alston's car was a white 1973 Pontiac Grand Prix with a white vinyl roof compared with DeLay's description of a white Monte Carlo, Buick or Grand Prix with a red landau roof.

2. At the time of his arrest, Alston had in his possession a .32 caliber pistol containing six rounds of ammunition.

3. On January 5, 1977, DeLay selected the name George Alston from a police-prepared list of four names, Johnson, Alston, Alton and Alman, all preceded by the name George, as the name he wrote on the first check.

4. Also on January 5, 1977, DeLay selected a photograph of Alston out of a display of six photographs as that of his assailant.

5. On January 22, 1977, DeLay picked Alston out of a line-up consisting of six black males between the ages of 20 and 25, all approximately six feet tall and of medium build, characteristics which matched DeLay's description of his assailant.

6. The bank teller at the drive-in window of the Cape Fear Bank indicated that Alston's picture looked familiar when it was shown to her along with other photographs.

7. Ballistics evidence indicated that a bullet removed from DeLay's back had been fired by the .32 caliber weapon in Alston's possession at the time of his arrest.

The following evidence, however, tended to show that Alston was not DeLay's assailant:

1. Alston's car was white with a white top, while DeLay's description of his assailant's car referred to a red top.

2. At the time of his arrest, Alston was accompanied by three black males and a black female, and the vehicle which he was driving when arrested was registered in the name of David Gaylor, one of the passengers in the car.

3. Although DeLay testified that he wiped blood from his wound onto the seats of the car in which he was abducted, no blood was found by police in the car in which Alston was arrested. Additionally, Detective Burns, who was in charge of the investigation, testified that the vehicle had not been dusted for fingerprints to determine whether DeLay's fingerprints were in the car. (At an earlier trial, he erroneously testified that the car had been dusted for fingerprints.)

4. When DeLay first reported the crime to authorities, he was unable to recall the name which the assailant had directed him to write on the first check. When he attempted to spell the first name as "G-E-O-G", an agent

for the Army Criminal Investigation Division suggested "George", and DeLay agreed that it sounded familiar. With respect to the last name, DeLay told the agent that "Johnson" sounded familiar. It was only after the arrest of Alston that Agent Atkinson wrote out four names, Johnston, Alston, Alton and Alman, all preceded by the name George, from which DeLay selected the name George Alston.

5. Prior to the January 5, 1977 photographic identification, DeLay was shown another series of photographs containing a photograph of Alston but was unable to identify any of the individuals as his assailant.

6. There was evidence from which the jury might have found that DeLay had seen Alston in the courtroom on January 19, 1977, thus tainting his identification of the petitioner at the line-up three days later.

7. The bank teller testified that her attention during the check cashing was directed at DeLay, and that she could not positively identify the individual who was with him at the time.

8. While there was evidence that DeLay's assailant handled the check cashed at the Cape Fear Bank, no fingerprints of Alston were found on the check, although fingerprints belonging to DeLay and other unidentified individuals were found.

9. Testifying in his own behalf, Alston stated that he visited a neighbor, Linda Rhue, at her trailer from approximately 12:30 P.M. to 3:30 P.M. on December 30, 1977, the time of the crime. This was corroborated by Rhue.

10. Alston testified that he had left his gun at home while visiting Rhue. When he returned home and prepared to go out for the evening he took the gun and put it in his pocket because he planned to visit some rough local night clubs.

III.

During Alston's third trial, the State introduced evidence that at the time of his arrest Alston declined to answer questions after being informed of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966).¹ The following exchange took place between the prosecutor and Detective Burns:

Q: After advising him of his constitutional rights did you talk with him at all?

A: Well, sir, he stood on his constitutional rights.

Q: In other words, he didn't say anything to you at that time, did he?

A: He started to converse, sir, and then he just shut up and he said I want my lawyer and we abided by his wishes.

Defense counsel did not object to the admission of this evidence. In cross-examination of Detective Burns, Alston's lawyer asked what had prompted the police to designate Alston as the chief suspect in the case. Burns gave four reasons:

Up until this point the facts that we had uncovered were that (1) Mr. Alston fitted the description physically of the person who had robbed, kidnapped

¹Neither party presently recalls whether similar evidence was admitted at Alston's first two trials.

and shot Mr. DeLay; (2) he was operating a vehicle that fitted the description of the car that was utilized in the commission of the crime; (3) he was stopped on the military reservation of Fort Bragg [where] he had in his possession a weapon, a .32 caliber pistol with six rounds of .32 ball ammunition in it; and (4) *he did not give any statement concerning—I would say his activities on the date of the 30th of December, 1976. As I stated, he stood on his constitutional rights.* (emphasis added)

A bit later in the cross-examination, Burns described his encounter with Alston following the latter's arrest.

Mr. Alston started to talk after I read him his constitutional rights, and then he stood on his rights. He shut up. He said I want a lawyer. Right away. I respected his wishes.

Alston's lawyer made no attempt to have this testimony stricken and to obtain a curative instruction from the court to the jury.

The jury returned a verdict of guilty, and Alston was sentenced to life plus twenty years imprisonment. Alston's trial counsel took an appeal to the North Carolina Supreme Court which was denied. Alston then filed, *pro se*, a petition for state habeas corpus relief in Cumberland County Superior Court, claiming ineffective assistance of counsel in contravention of the sixth and fourteenth amendments to the United States Constitution. After that petition was denied, he filed a Motion for Appropriate Relief, which was dismissed without an evidentiary hearing on March 16, 1979. The North Carolina Court of Appeals affirmed and the North Carolina Supreme Court denied certiorari on June 18, 1979.

Alston began his pursuit of federal habeas relief on January 22, 1981, filing a petition under 22 U.S.C. § 2254

in the federal district court for the Eastern District of North Carolina. On October 28, 1981, the court granted the State's motion to dismiss, denying Alston's petition on the ground that he had failed properly to raise his claims at trial, on direct appeal from his conviction, and in his post trial motions in the North Carolina courts, and that he was thus barred from any relief in federal court under 22 U.S.C. § 2254 for failure to exhaust state remedies. After Alston informed the court that he had in fact raised the claims contained in his federal habeas petition in his state court Motion for Appropriate Relief, the district court entered a new order holding that Alston was denied the effective assistance of counsel,² but that in light of all the evidence, the constitutional error was harmless. The writ was, therefore, denied.

IV.

Under *Wainwright v. Sykes*, 433 U.S. 72 (1977), and *Cole v. Stevenson*, 620 F.2d 1055 (4th Cir. 1980) (en banc), cert. denied, 449 U.S. 1004 (1980), a state rule requiring contemporaneous objection at trial to alleged errors of law bars federal habeas review of issues that were not objected to or appealed in state proceedings. Only if the petitioner for federal habeas relief can show good cause for failing to raise the issue in the state proceedings and

²The district court was not troubled by the fact that Alston had not complied with North Carolina's contemporaneous objection rule on his sixth amendment claim, reasoning that "[a] finding of ineffective assistance of counsel sufficiently demonstrates 'cause' [for nonobjection] and 'prejudice' [resulting from the constitutional violation] and will allow the court to address issues affected by this claim on their motion." See *Wainwright v. Sykes*, 433 U.S. 72 (1977).

actual prejudice to the outcome of the trial can he or she obtain federal review of constitutional claims. In this case, the claim of ineffective assistance of counsel obviously was not raised by Alston's counsel, either at trial or on appeal. Therefore, Alston seeks to place himself within the cause and prejudice exception to *Wainwright*. He offers as cause for failing to raise the issue below the fact that Alston's trial counsel continued to represent him through his unsuccessful direct appeal to the North Carolina Supreme Court and could hardly have been expected to assert his own incompetence.

We are satisfied with Alston's excuse for failing to raise his ineffectiveness claim at trial and on state appeal. The content of an appeal is heavily controlled by counsel, and where, as here, the defendant's trial lawyer also prosecuted the appeal, it is obvious that ineffective assistance of counsel is not likely to be raised at trial or to appear among the assignments of constitutional error. *Cf. Townsend v. Henderson*, 692 F.2d 262 (2nd Cir. 1982) (where defendant was represented by new counsel on direct appeal, failure to assert sixth amendment claim invoked the *Wainwright* bar to federal review); *United States ex rel. Caruso v. Zelinsky*, 689 F.2d 435 (3rd Cir. 1982) (where state rule required collateral claims to be raised within five years of conviction, *Wainwright* bar applied to federal habeas petitioner who did not assert ineffectiveness claim until more than five years after conviction).

We also believe that trial counsel's [undisputed] incompetence worked to Alston's actual and substantial prejudice, infecting the entire trial. *See United States v. Frady*, 456 U.S. 152 (1982). Few mistakes by criminal defense counsel are so grave as the failure to protest evi-

dence that the defendant exercised his right to remain silent. See *Doyle v. Ohio*, 426 U.S. 610 (1976); *Williams v. Zahradnick*, 632 F.2d 353 (4th Cir. 1980). Such evidence plants in the mind of the jury the dark suspicion that the defendant had something to hide, and that any alibi which is subsequently proffered is pure fabrication. The Supreme Court best stated these concerns in *Doyle v. Ohio*, 426 U.S. 610 (1976), holding that comment on a defendant's post-arrest silence violated due process of law:

The warnings mandated by [*Miranda v. Arizona*, 384 U.S. 436 (1966),] as a prophylactic means of safeguarding Fifth Amendment rights . . . require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Id. at 617-18 (citations and footnotes omitted). In the present case, defense counsel permitted evidence of Alston's silence to come in not once, but on three separate occasions. Alston's defense of alibi stood faint hope of impressing the jury under these circumstances, so in our opinion, the petitioner has adequately demonstrated the

existence of prejudice flowing from his counsel's incompetence, as required under the cause and prejudice caveat to *Wainwright v. Sykes*.

V.

We turn next to the merits of Alston's constitutional claim. There can be no doubt, as indeed the district court held, that the representation rendered by Alston's court-appointed attorney grossly violated the defendant's sixth amendment rights. Since 1976, when *Doyle v. Ohio* was decided, the law has been clear that admitted evidence of post-arrest silence violates due process of law. Failure to oppose the admission of such evidence plainly falls beneath the "range of competence demanded of attorneys in criminal cases." *Marzullo v. Maryland*, 561 F.2d 540, 543 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978).³

Next we must decide on the record before us whether the constitutional error was harmless. See *Chapman v.*

³Further evidence of counsel's incompetence is seen in the failure to object to testimony by Detective Burns that counsel congratulated police on the quality of the line-up out of which Alston was picked as the assailant:

- Q. Did [appointed defense counsel] tell you anything about the line-up?
- A. He said that was a mighty fine line-up. He said that was the best one he had ever saw—I don't remember if he said it was the best one he ever saw but he said it was a very good line-up.

While Alston's counsel had no business making such a statement in the first place, the real damage resulted from his failure to object when the statement was presented at trial. By this evidence, counsel appeared to vouch for the accuracy of the line-up which inculpated his client. The very essence of the adversarial system is violated by a performance such as this one by counsel.

California, 386 U.S. 18 (1967). In the recent case of *United States v. Hasting*, — U.S. —, 76 L.Ed.2d 96, 103 S.Ct. (1983), the Supreme Court considered the harmless error doctrine where evidence was admitted that the defendants stood mute. The Court first noted that “a judgment may stand only when there is no reasonable possibility that the [practice] complained of might have contributed to the conviction.” *Id.* 76 L.Ed.2d at 104, quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963). The Court then held that the proper inquiry was whether viewing the entire record it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty absent evidence of the defendant’s silence. *Id.* 76 L.Ed. at 107. The *Hasting* Court answered that question affirmatively where victims of a communal rape promptly and positively identified the defendants in a police line-up; where neutral witnesses also saw the defendants escorting the women; and where the crime vehicle—a turquoise Cadillac—was a singular color and was registered to one of the defendants.

Here, in contrast, the evidence is not so airtight. While some of the evidence against Alston was indeed potent, especially the testimony that Alston had possession of the crime weapon, nagging gaps in the proof appear: the absence of the defendant’s fingerprints on the check extorted from DeLay; the failure by authorities to dust for the victim’s fingerprints in the alleged crime car; the absence of bloodstains in the car where the victim allegedly sat wounded; the registration of the car to someone other than Alston; DeLay’s initial failure to pick Alston’s face out of a mug book. This evidence provoked

enough doubts to result in hung juries the first two times Alston was tried.

Furthermore, "because the nature of a *Doyle* error is so egregious and so inherently prejudicial, reversal is the norm rather than the exception." *Williams v. Zahradnick*, 632 F.2d 353, 363 (4th Cir. 1980) (footnote omitted). In *Williams*, this court distilled five factors to be weighed in determining whether a *Doyle* error was harmless:

1. The use to which the prosecution puts the post-arrest silence.
2. Who elected to pursue the line of questioning.
3. The quantum of other evidence indicative of guilt.
4. The intensity and frequency of the reference.
5. The availability to the trial judge of an opportunity to grant a motion for mistrial or to give curative instructions.

Id. at 361-62 (footnotes omitted). As applied to the facts before us, we note that it was the prosecutor who first deliberately elicited evidence of Alston's silence, evidence which tended to undermine Alston's alibi defense. Later, on cross-examination, defense counsel managed twice to hand Detective Burns opportunities to point out that Alston "stood on his constitutional rights." No tactical maneuver can explain the failure of counsel to keep out this evidence. The quantum of other evidence indicative of guilt in our opinion "was not persuasive enough to tip the scale towards harmless error." *Williams v. Zahradnick*, 632 F.2d at 365. As to "the intensity and frequency of the reference," Detective Burns three times distinctly alluded to Alston's silence. And because Alston's lawyer failed to object or to move to strike, the trial judge was

never requested to give curative instructions. Nor did the trial judge give such instructions *sua sponte*. In short, we find reason to fear that the shortcomings of counsel infected the outcome of Alston's third trial, and for that reason, a writ of habeas corpus must issue, conditional on the results of a new trial.

We hold that the denial of effective representation of counsel to George Alston was not harmless error, and that therefore the judgment of the district court must be reversed.

REVERSED.

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Filed Nov. 17, 1983

No. 82-6799

George Smith Alston,

Appellant,

versus

Samuel P. Garrison;
Rufus Edmisten, Attorney
General of N.C.,

Appellees.

Appeal from the United States District Court for the
Eastern District of North Carolina, at Raleigh.

Upon consideration of a motion of the appellees, for
stay of mandate pending application to the Supreme Court
of the United States for a writ of certiorari,

IT IS ORDERED that the motion is DENIED.

For the Court—by Direction.

/s/ William K. Slate, II
Clerk